INDEX

CITATIONS

Cases—Continued. Page

In the Supreme Court of the United States

OCTOBER TERM, 1937

No. 919

RICHARD E. LANG, EXECUTOR, AND GRACE E. LANG, EXECUTRIX, OF THE ESTATE OF JULIUS C. LANG, DECEASED

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE COMMISSIONER

OPINION BELOW

The opinion of the United States Board of Tax Appeals is reported in 34 B. T. A. 337.

JURISDICTION

The certificate of the Circuit Court of Appeals, as amended, was filed in this Court on April 2, 1938. Jurisdiction is conferred on this Court by Section

239 of the Judicial Code, as amended by the Act of February 13, 1925:[1]

QUESTIONS CERTIFIED

1. A husband and wife were at all pertinent times residents of the State of Washington, and the husband, during marriage, applied for a policy of insurance on his own life (which policy was to be payable to beneficiaries other than his estate or his representatives), and, from funds of the community, paid the first premium thereon, required to be paid prior to or concurrent with the issue of the policy, and thereafter received the policy, and all subsequent premiums on such insurance were paid for solely with community funds of the husband and his wife, and the husband, while both spouses resided in the State of Washington, thereafter died.

In such a situation, in determining the amount of insurance, if any, in excess of $40,000, to be included in the gross estate of the deceased husband to be subject to the estate tax under the estate tax provisions of the Revenue Act of 1926, and particularly Section 302 (g) thereof, is the entire amount of the insurance in the last sentence described, or only one-half thereof, deemed to be "taken out by" the husband and to be included in the amount in his estate?

2. A resident of the State of Washington, being unmarried, applies for and receives a policy of in-

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[1] See *Old Colony Tr. Co.* v. *Commissioner*, 279 U. S. 716.

surance upon his own life, which policy is payable to beneficiaries other than his estate or his representatives, and pays premiums thereon out of his separate property, and subsequently is married, and, while being married and a resident of the State of Washington, pays further premiums on such policy out of community funds of himself and his wife, and while both are residents of the State of Washington the husband dies.

In this situation, in determining the amount of insurance, if any, in excess of $40,000 in the gross estate of the deceased husband, sought to be taxed under the estate tax provisions of the Revenue Act of 1926, and particularly Section 302 (g) thereof, should it be computed by inclusion of that portion of the insurance which is paid for by premiums paid from community funds of the husband and wife?

3. If the answer to the last question be in the negative, should the amount of insurance to be included be that proportion thereof which the premiums paid by the husband out of the funds other than those of the community bear to the total premiums paid plus one-half the remaining insurance?

4. Incorporating herein by reference the facts stated in question 1, there is added the further fact that the decedent's surviving spouse is the sole beneficiary of the said insurance policy. If the answer to question 1 be that the entire amount of the insurance there described is to be deemed "taken out by" the husband and deemed to be in-

cluded in the amount of his estate, does the inclusion of the additional fact herein stated require that only one-half of said insurance is so to be deemed?

5. Incorporating herein by reference the facts stated in question 2, there is added the further fact that the decedent's surviving spouse is the sole beneficiary of said policy. If the answer to question 2 be in the affirmative, does the inclusion of the additional fact herein stated require that one-half of that portion of the insurance which was paid for out of community funds of the decedent and his wife be excluded from the gross estate of the decedent?

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved will be found in Appendices A and B, *infra*, pp. 45–55.

STATEMENT

The certificate of the Circuit Court of Appeals sets forth the following facts (pp. 1–2):

The decedent, Julius C. Lang, died in 1929, a citizen and resident of the State of Washington. At the time of his death there were in force and effect seventeen policies of insurance on his life. They totaled more than $200,000. His wife was the beneficiary of fourteen of the policies and his children were beneficiaries of the other three. All the policies required the payment of premiums in advance and acknowledged the receipt of the first premium.

From 1905 until the date of his death the decedent was married and he and his wife, who survives him, were citizens of Washington, where the community property law obtains. Fourteen of the policies (including the three payable to his children) were applied for by him during his marriage, and all of the first premiums paid upon issuance of the policies as well as all subsequent premiums were paid from the community funds of the decedent and his wife. The remaining three were issued to him before his marriage. The first few premiums on these three were paid by him out of his separate property and the remainder were paid out of community funds.

The Commissioner of Internal Revenue determined a deficiency in estate tax based upon his ruling that under Section 302 (g) of the Revenue Act of 1926 the entire proceeds of the policies should be included in the gross estate, subject to the $40,000 exemption.

SUMMARY OF ARGUMENT

I

The life insurance policies involved in this case are all payable to beneficiaries other than the decedent's estate, and the questions certified admit that but for the circumstance that the premiums were paid from community funds of the decedent and his wife the total proceeds of the policies would be included in the gross estate to the extent that they exceed the exemption of $40,000. The ques-

tion is whether a part of the insurance proceeds should be excluded for the reason that part of the premiums on some of the policies and all of the premiums on the remaining policies were paid out of community funds.

Section 302 (g) of the Revenue Act of 1926 provides in substance that the proceeds of insurance policies payable to specific beneficiaries are to be included in the gross estate when the policies are "taken out by the decedent upon his own life." In terms it contains no exception based upon the fact that the decedent has not paid the premiums. Much less does it provide that the payment of premiums from a fund in which someone else has an interest shall operate to exclude a part of the proceeds proportionate to that interest from the gross estate. The Treasury regulations have never provided that any part of the proceeds of policies are to be excluded where someone other than the decedent, but not the beneficiary, has paid part of the premiums. The courts have held that all of the proceeds are to be included in such cases. Hence with respect to the policies made payable to the decedent's children the mere fact that all of the premiums were paid from community funds does not require that part of the proceeds be excluded.

The remaining policies in this case were made payable to the wife, and Article 25 of Regulations 70 (1929 Ed.), which, if valid, was in effect at the date of the decedent's death, provides that insurance is not deemed to be taken out by the decedent,

even though the application is made by him, where all the premiums are actually paid by the beneficiary; and further provides that where a portion of the premiums are paid by the beneficiary and the remaining portion by the decedent, the insurance will be deemed to have been taken out by the latter in the proportion that the premiums paid by him bear to the total amount of the premiums paid. Similar provisions were incorporated in earlier regulations. Those regulations have been sustained by the courts.

If we accept the suggestion of the court below that the community is a separate entity like a corporation, Article 25 of Regulations 70 would have no application to this case. Under that theory the premiums on the policies have been paid by the community as a legal entity and the wife individually is the beneficiary. But we do not believe that the fiction that the community is a legal entity should be accepted for tax purposes and do not rely upon this argument.

There is support for the view that Article 25 of Regulations 70 does not prevent the inclusion in the decedent's gross estate of the proceeds of the policies payable to his wife, for the reason that the decedent himself actually paid the premiums even though he used community funds.

But even if it be considered that the wife paid half of such premiums, Article 25 of Regulations 70 should not control. That article unduly restricts Section 302 (g) of the Revenue Act of 1926 and is

invalid. The qualifying phrase "taken out by the decedent" has no fixed meaning and in using it Congress undoubtedly intended to exercise its constitutional power to tax the proceeds of insurance policies made payable to specific beneficiaries to the fullest extent possible. That intention would seem to require the inclusion in the gross estate of the proceeds of policies on the decedent's life when he retains the right to change the beneficiary or other incidents of ownership, regardless of who pays the premiums. This construction has been adopted under later regulations (see Article 25, Regulations 80 (1934 Ed.), Appendix A, *infra*, p. 48), and states the correct rule. A wife does not buy an interest in an insurance policy by paying part of the premiums, where the decedent reserves the right to change the beneficiary and other incidents of ownership.

We recognize the rule of construction which requires great weight to be given to a Treasury regulation which has continued in effect after there has been an enactment of another statute similar to that construed by the regulations; but a rule of construction cannot serve to perpetuate a regulation which unduly restricts the statute and is inconsistent with it. Article 25 of Regulations 70 is both inconsistent with the statute and unreasonable and should be set aside.

II

Both with respect to the policies made payable to the wife and those made payable to the children

the issue is whether the fact that all or a portion of the premiums were paid from community funds deprived the decedent husband of the incidents of ownership and control of the policies on his life which he otherwise had. Incidents of ownership include the right to change the beneficiary, to surrender and cancel the policies, to pledge them as security for loans, and to dispose of them and the proceeds for his own benefit during his life.

Under the laws and decisions of the State of Washington the husband has the complete and exclusive right to manage, control, and dispose of community personal property, with the qualification that he cannot devise by will more than one-half of such property. The test as to whether his contracts relating to community personal property bind the community is whether they were made in the course of his management for the benefit of the community, and not whether they are of actual benefit to it. The statute does not even provide that he cannot give away community property without his wife's consent, although the decisions hold that he cannot give away a substantial amount. In any case, the burden of proof is upon the wife when she seeks to interfere.

There are few Washington decisions dealing with the wife's interest in proceeds of insurance policies the premiums on which are paid with community funds. We have found none indicating that she

may claim an interest in policies originally made payable to the decedent's children or other beneficiaries, where the decedent has reserved the right to change the beneficiaries. In the absence of any such decisions, it must be concluded that the husband who applied for the policies and named the beneficiaries retained all the incidents of ownership which he would have had if he had used his separate funds in paying the premiums.

The law with reference to policies which are made payable to the wife is not well settled. In one case the Supreme Court of Washington held that a wife could not claim an interest in a benefit certificate originally made payable to her, where the decedent had changed the beneficiary without her knowledge and the premiums were paid with community funds. In a later case, involving a regular life insurance policy, a divided court held, under similar circumstances, that she could recover. We do not believe that the decision in the second case represents a sound application of the Washington law. But even if it is controlling, it stands merely for the principle that the change of beneficiary in such a case would be effective so long as the wife did not assert a claim; in other words, that the beneficiary would acquire an interest in the policy subject to its being defeated.

It has been held in the Washington decisions that the wife as beneficiary acquires no vested interest in policies which are made payable to her subject to the right of the husband to change the bene-

ficiary, even where part of the premiums are paid with community funds. He may change the beneficiary under such a policy to another for a consideration, as, for example, for his own support, and he may assign it for a consideration. It may be argued that he can do so only for a consideration flowing to the community, but such an argument loses sight of the fact that the husband's purposes and the community's are practically identical and that he could assign the policy to pay his own personal expenses. Under those circumstances, the decedent retains sufficient incidents of ownership to render the policies subject to the Federal estate tax.

ARGUMENT

I

UNDER SECTION 302 (G) OF THE REVENUE ACT OF 1926 NO PART OF THE PROCEEDS OF INSURANCE ON THE DECEDENT'S LIFE SHOULD BE EXCLUDED FROM HIS GROSS ESTATE MERELY BECAUSE THE PREMIUMS WERE PAID FROM COMMUNITY FUNDS IN WHICH HIS WIFE HAD AN INTEREST

The certificate presents various questions as to whether the fact that the premiums are paid from community funds of a husband and wife domiciled in the State of Washington affects the extent to which the proceeds of an insurance policy on the husband's life may be included in his gross estate for Federal estate tax purposes. The policies in question are all payable to beneficiaries other than the decedent's estate and the questions certified ad-

mit that but for the circumstance that the premiums were paid from community funds, the total proceeds of the policies would be included in the gross estate to the extent that they exceed the exemption of $40,000. See Section 302 (g) of the Revenue Act of 1926 (Appendix A, *infra*, p. 45). The only question is whether a proportionate part of the proceeds of any policy, the premiums on which were paid out of community funds is to be excluded.

We shall discuss first the question whether the mere fact that the premiums are paid from community funds operates to exclude part of the proceeds of the policies payable to beneficiaries other than the wife (in this case, to the decedent's children). With reference to the policies which are payable to the wife, additional problems arise.

(A) *The policies payable to beneficiaries other than the wife*

Section 302 of the Revenue Act of 1926 provides in part that there shall be included in the gross estate of the decedent the value of all property, real or personal, tangible or intangible, wherever situated—

> (g) To the extent of the amount receivable by the executor as insurance under policies taken out by the decedent upon his own life; and to the extent of the excess over $40,000 of the amount receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life.

The statute in terms provides that the proceeds of insurance policies payable to specific beneficiaries are to be included in the gross estate when the policies are "taken out by the decedent upon his own life." In terms it contains no exception based upon the fact that the decedent has not paid the premiums. Much less does it provide that the payment of premiums from a fund in which someone else has an interest shall operate to exclude a part of the proceeds proportionate to that interest from the gross estate.

The legislative history of the provision does not indicate that Congress had any exceptions of that character in mind. In enacting Section 402 (f) of the Revenue Act of 1918, c. 18, 40 Stat. 1057, the first statute to contain a provision for including the proceeds of policies payable to specific beneficiaries, the House Committee on Ways and Means said in its report (H. Rep. No. 767, 65th Cong., 2d Sess., p. 22):

> The gross estate section has been amended to specifically include (1) insurance receivable by the executor under policies taken out by the decedent upon his own life and (2) insurance in excess of $40,000 receivable by all specific beneficiaries under policies taken out by the decedent upon his own life. (1) Insurance payable to the executor or to the estate is now regarded as falling within section 202 (a) of the existing statute and this construction of the existing statute is now

> written into the new bill for the sake of clearness. The amendment will serve the further purpose of putting on notice those who acquaint themselves with the statute for the purpose of making more definite plans for the disposition of their property. (2) The provision with respect to specific beneficiaries has been included ~~for~~ the reason that insurance payable to such beneficiaries usually passes under a contract to which the insurance company and the individual beneficiary are the parties in interest and over which the executor exercises no control. Amounts passing in this way are not liable for expenses of administration or debts of the decedent and therefore do not fall within the existing provisions defining the gross estate. It has been brought to the attention of the Committee that wealthy persons have and now anticipate resorting to this method of defeating the estate tax. Agents of insurance companies have openly urged persons of wealth to take out additional insurance payable to specific beneficiaries for the reason that such insurance would not be included in the gross estate. A liberal exemption of $40,000 has been included and it seems not unreasonable to require the inclusion of amounts in excess of this sum.

The Treasury regulations have never attributed any significance to the payment of premiums by persons other than the decedent, except in cases where the premiums are paid by the beneficiary.

Article 25 of Regulations 70 (1929 Ed.), Appendix A, *infra,* p. 46, provided that insurance was not deemed to have been taken out by the decedent where all the premiums were paid by the beneficiary, and provided further that where a portion of the premiums were paid by the beneficiary and the remaining portion by the decedent the insurance would be deemed to have been taken out by the latter in the proportion that the premiums paid by him bore to the total premiums paid. Those regulations were silent as to the payment of premiums by any other person. These provisions were changed in Article 25 of Regulations 80 (1934 Ed.), *infra,* to provide that the insurance is considered to have been taken out by the decedent "in all cases, whether or not he makes the application, if he pays the premiums either directly or indirectly, or they are paid by a person other than the beneficiary, or decedent possesses any of the legal incidents of ownership in the policy." We shall hereinafter discuss the effect of these regulations with reference to the policies payable to the wife, who was the beneficiary under fourteen of the policies here involved. At this point we merely wish to emphasize that neither Regulations 70 nor the later regulations have provided that the proceeds of an insurance policy payable to a specific beneficiary are to be excluded, in whole or in part, when the premiums are paid, in whole or in part, by some person other than the decedent but not by the beneficiary. Nor have they provided that the proceeds

are to be excluded in part when the premiums are paid by the decedent out of a fund in which another not the beneficiary has an interest.

With the single exception of the decision in *Wilson* v. *Crooks*, 52 F. (2d) 692 (W. D. Mo.), the courts have uniformly held that the fact that someone other than the decedent, but not the beneficiary, has paid the premiums on an insurance policy on the decedent's life is not a ground for excluding the proceeds from the decedent's gross estate. *Millie Belle Brown* v. *Commissioner* (C. C. A. 6th), decided March 11, 1938, not yet officially reported, but found in 1938 C. C. H., Vol. 4, Par. 9178; *Bank of America Nat. T. & Sav. Ass'n* v. *Commissioner*, 90 F. (2d) 981 (C. C. A. 9th). See also *Newman* v. *Commissioner*, 76 F. (2d) 449 (C. C. A. 5th), certiorari denied, 296 U. S. 600; *Bromley* v. *Commissioner*, 16 B. T. A. 1322. In the *Newman* and *Bank of America* cases it was directly held that the proceeds of insurance policies payable to specific beneficiaries were to be included in the gross estate, notwithstanding the fact that the decedents paid the premiums from funds which constituted community property under the laws of California and Louisiana. There are distinctions which may be drawn between the *Newman* case, the *Bank of America* case, and this case, which are discussed hereinafter (*infra*, pp. 22, 37), but under the laws of all three States involved the wife has a vested interest in the community property. See *Poe* v. *Seaborn*, 282 U. S. 101; *Bender* v. *Pfaff*, 282 U. S. 127;

United States v. *Malcolm,* 282 U. S. 792. Hence, those cases are authority for the principle that the mere fact that the premiums on policies on the husband's life are paid with community funds is not enough to exempt part of the proceeds from the tax.

If the proceeds of a policy would not be exempt in a case where the decedent took out insurance on his life and the premiums were actually paid by another (*Millie Belle Brown* v. *Commissioner, supra*), we submit that there is less justification for holding the proceeds exempt where the premiums have been paid by the husband from community funds. In such a case, while the payment is made from funds in which the wife has a vested interest, the husband has power to control and manage the funds (*Poe* v. *Seaborn, supra*) and he makes the actual payment.

In principle we see no distinction between taxing as a part of the decedent's gross estate proceeds of insurance on his life which have been paid for by someone else and taxing the value of property passing under a general power of appointment exercised by the decedent, where the trust creating the power has been established by someone else. See Section 302 (f) of the Revenue Act of 1926; *Commissioner* v. *Nevius,* 76 F. (2d) 109 (C. C. A. 2d), certiorari denied, 296 U. S. 591; *Old Colony Trust Co.* v. *Commissioner,* 73 F. (2d) 970 (C. C. A. 1st); *Blackburne* v. *Brown,* 43 F. (2d) 320 (C. C. A. 3d); *Johnstone* v. *Commissioner,* 76 F. (2d) 55 (C. C. A. 9th), certiorari denied, 296 U. S. 578;

Fidelity-Philadelphia Trust Co. v. *McCaughn*, 34 F. (2d) 600 (C. C. A. 3d), certiorari denied, 280 U. S. 602. See also *Helvering* v. *Grinnell*, 294 U. S. 153. In substance, a beneficiary of an insurance policy is an appointee of the insured. *Kincaid* v. *New York Life Ins. Co.*, 66 F. (2d) 268 (C. C. A. 5th); *Mutual Ben. Life Ins. Co.* v. *Swett*, 222 Fed. 200 (C. C. A. 6th). See also *Chase Nat. Bank* v. *United States*, 278 U. S. 327.

We submit, therefore, that the mere fact that the premiums on the policies payable to the children were paid from community funds of the husband and wife does not serve to exempt any part of the proceeds of those policies from the tax.

(B) *The policies payable to the wife*

Article 25 of Regulations 70 (1929 Ed), Appendix A, *infra*, p. 46, provides that insurance is not deemed to be taken out by the decedent, even though the application is made by him, where all the premiums are actually paid by the beneficiary, and further provides that where a portion of the premiums are paid by the beneficiary and the remaining portion by the decedent the insurance will be deemed to have been taken out by the latter in the proportion that the premiums paid by him bear to the total amount of the premiums paid.[2]

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[2] See, also, Article 28, Regulations 70 (1929 Ed.), *infra*. But in Article 27 of Regulations 70 (1929 Ed.), *infra*, it is provided that all insurance in excess of $40,000 must be included where the decedent during his life retained legal incidents of ownership.

Similar provisions had been incorporated in earlier regulations. See Article 25, Regulations 70 (1926 Ed.), and Article 25 of Regulations 68 (1924 Ed.). Under Article 25 of Treasury Regulations 80 (1934 Ed.), Appendix A, *infra,* p. 48, this provision was changed to provide that insurance is deemed to have been taken out by the decedent in all cases, whether or not he makes the application, if he pays the premiums, either directly or indirectly, *or* they are paid by a person other than the beneficiary, *or* the decedent possesses any of the legal incidents of ownership. The third of these criteria is made the sole test in Article 25 of Regulations 80 (1937 Ed.). In Article 110 of Regulations 80 (1934 Ed.), it was specifically provided that the regulations should apply to taxes imposed under the Revenue Act of 1926, as amended by the Revenue Act of 1928, except where the provisions of those statutes were different. But by Treasury Decision 4729, 1937–1 Cumulative Bulletin 284, Article 25 of Regulations 80 (1934 Ed.) was amended to provide that in the case of a decedent dying before November 7, 1934 (the date of approval of the regulations), the provisions of the second paragraph of Article 25 of Regulations 70 (1929 Ed.) would continue to apply. Hence, the provisions of Article 25 of Regulations 70 relating to the exclusion of part of the proceeds of insurance policies from the gross estate where the beneficiary has paid part of the premiums was in effect for the year 1929 when the decedent in this case died.

We concede also that this regulation has been sustained by the courts. *Walker* v. *United States*, 83 F. (2d) 103 (C. C. A. 8th); *Helvering* v. *Reybine*, 83 F. (2d) 215 (C. C. A. 2d).

The certificate of the court below suggests that under the Washington decisions the community is an entity like a corporation. If we accept the theory that in Washington the community funds are owned by a separate legal entity (see *Ostheller* v. *Spokane & Inland Empire R. Co.*, 107 Wash. 678, 685; *Mattinson* v. *Mattinson*, 128 Wash. 328), Article 25 of Regulations 70 would have no application to this case. Under that theory the premiums on the policies have been paid by the community as a legal entity, whereas the wife individually is the beneficiary, and no question of the exclusion of proceeds of a policy where the beneficiary has paid part of the premiums would be presented. We believe, however, that the theory that there is such a legal entity is a mere fiction, and that it has not been recognized for Federal tax purposes. *Poe* v. *Seaborn*, *supra*. There is no more reason for giving it controlling effect than there is for accepting the fiction that a husband and wife are one person in relation to tenancies by the entirety. See *Tyler* v *United States*, 281 U. S. 497.

It may be argued more forcefully that the regulation does not apply because the decedent himself actually paid the premiums, even though he paid them from community funds. A decedent

who had borrowed money or had been given money with which to pay premiums on a policy on his life would no doubt be considered as having "taken out" the insurance. Similarly, in this case the use of funds in which the wife had an interest could mean that she had lent or given the money for that purpose. In *Newman* v. *Commissioner, supra,* the court said (p. 452):

> Appellants with great confidence press the further argument that the case presented is, within articles 25 and 28, Treasury Regulations, a case of the payment of premiums in part by the beneficiary and in part by the decedent. They say this results from the operation in Louisiana of the community property system. That under its operation, as stipulated, the premiums the husband paid must be regarded as paid with community funds and therefore one-half by the insured, and one-half by his beneficiary. That this being so, it must be held that, within the meaning of the regulations, the beneficiary paid one-half of the premiums, and the decedent only one-half. That this contention is more logically than legally sound, we think a little reflection will show. We think it may well be doubted whether these regulations would be valid if so construed. They were adopted under a statute which does not in terms authorize any diminution on account of community payment of premiums, but on the contrary, in plain terms, requires that all over $40,000 of the proceeds of policies taken out by the insured

> in favor of the beneficiary, be included in his gross estate. In this view, it may well be doubted whether the regulations if so construed, would not be beyond administrative power. "The only authority conferred, or which could be conferred, by the statute is to make regulations to carry out the purposes of the act—not to amend it." *Miller* v. *United States,* 55 S. Ct. 440, 442, 79 L. Ed., —— March 4, 1935.

See also *Bank of America Nat. T. & Sav. Ass'n* v. *Commissioner, supra,* and compare *Helvering* v. *Reybine, supra,* and *Walker* v. *United States, supra.* While the court in the *Newman* case relied upon Louisiana decisions which hold that a contract of insurance is a contract *sui generis* and that when community funds are used to pay premiums on insurance on the husband's life the wife is not considered as having paid the premiums, we believe that its suggestion that the regulation was not intended to authorize any diminution on account of community payment of premiums is entitled to consideration.

But even if it must be considered that the wife in this case paid one-half of all the premiums paid with community funds, for the reason that under the decision in *Poe* v. *Seaborn, supra,* one-half of those funds represented her money, and hence that the case comes within the rules laid down in Article 25 of Regulations 70, *infra,* we submit that Article 25 goes beyond the statute and is invalid.

The language of the statute requires the proceeds to be included when the policies are "taken out by the decedent." The words "taken out by" have no fixed meaning. To the layman they would mean that he applied for the policy, or acquired it by purchase (see *Igleheart* v. *Commissioner,* 77 F. (2d) 704 (C. C. A. 5th)); that he chose the beneficiary; and that the policy had been delivered to him. We think that it would never occur to him that the insurance had only partly been taken out by him because in some year or years when he had reverses he called upon his wife to pay the premiums or she voluntarily did so, or because in normal years the premiums were paid out of community funds. Much less would it occur to him that this would be true with respect to policies which were issued before his marriage. Three of the policies involved in this case were of that character.

In *Royal Arcanum* v. *Behrend,* 247 U. S. 394, this Court held that the fact that the beneficiary had paid an assessment on a benefit certificate did not deprive the decedent of his right to change the beneficiary. We do not think that a different rule applies to regular life insurance where the right to change the beneficiary is reserved. Hence it cannot be said that the wife who pays a part of the premiums purchases an interest in the proceeds. In reality she makes a gift where she has no assur-

ance of retaining her interest as beneficiary.[3] In providing that the proceeds of policies payable to specific beneficiaries should be taxed to the extent that they exceed the very liberal exemption of $40,000, Congress undoubtedly intended to exercise its constitutional power to tax such proceeds to the fullest extent possible. See the House Report quoted pp. 13–14, *supra*. Compare *Irwin* v. *Gavit,* 268 U. S. 161. That intention would seem to require the inclusion of the proceeds of policies on the decedent's life where he retains the right to change the beneficiary or other incidents of ownership irrespective of who pays the premiums. *Chase Nat. Bank* v. *United States, supra,* does not hold that the decedent must pay the premiums in order for the proceeds to be taxed, although it does suggest that the fact that he has paid them may be an element which justifies the imposition of the tax. It would seem to be sufficient if he has paid the premiums, *or* if another (not the beneficiary) has paid them, *or* if he has retained incidents of ownership. This is the test laid down by Article 25 of Regulations 80. In *United States* v. *Supplee-Biddle Co.,* 265 U. S. 189, this Court stated, as a ground of decision upon a different issue, that the proceeds of an insurance policy on the life of a corporate officer of which the corporation was beneficiary and on which it paid the premiums were to be included in the gross estate under Section 402 (f) of the Revenue Act of

[3] See Clark, "Inheritance and Estate Taxes on Life Insurance", pp. 46–48.

1918. The provision in the Act of 1918 is identical with that of Section 302 (g) of the Revenue Act of 1926.

In so far as Article 25 of Regulations 70 provides for the exclusion of all or a part of the proceeds where the beneficiary has paid all or a part of the premiums, we submit that it unduly restricts the statute and encourages tax avoidance. If a married man may avoid an estate tax on the proceeds of insurance policies payable to his wife or children by the simple expedient of permitting them, or a trustee for them, to pay the premiums (*Helvering* v. *Reybine, supra*), he may easily provide them with funds for that purpose and a large part of the effectiveness of the statute will be lost.

We recognize the rule of construction that requires great weight to be given to a Treasury regulation which has continued in effect after there has been a reenactment of another statute similar to that construed by the regulation (*Brewster* v. *Gage,* 280 U. S. 327; *Mass. Mutual Life Ins. Co.* v. *United States,* 288 U. S. 269; *Old Mission Portland Cement Co.* v. *Helvering,* 293 U. S. 289; *Walker* v. *United States, supra*); but we do not think that that rule of construction can serve to perpetuate a regulation which unduly restricts the statute and is inconsistent with it. In *Manhattan Co.* v. *Commissioner,* 297 U. S. 129, rehearing denied, 297 U. S. 728, this Court said (pp. 134–135):

> The power of an administrative officer or board to administer a federal statute and to

> prescribe rules and regulations to that end is not the power to make law—for no such power can be delegated by Congress—but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity. *Lynch* v. *Tilden Produce Co.,* 265 U. S. 315, 320–322; *Miller* v. *United States,* 294 U. S. 435, 439–440, and cases cited. And not only must a regulation, in order to be valid, be consistent with the statute, but it must be reasonable. *International Ry. Co.* v. *Davidson,* 257 U. S. 506, 514. The original regulation, as applied to a situation like that under review, is both inconsistent with the statute and unreasonable.

The reasoning of the Court is applicable to this case. The view of the court in *Walker* v. *United States, supra,* that the Commissioner could not change Article 25 of Regulations 70 and that it must control seems fundamentally unsound if, as we believe, that regulation was not in accord with the statute.

We submit that the correct rule to be applied is found in Article 25 of Regulations 80 (1937 Ed.), which provides that the proceeds of the policies are to be considered as having been "taken out" by the decedent, if the decedent possesses any of the legal incidents of ownership in the policy. Applying those principles to the instant case, the proceeds of

the policies which are payable to the wife are not to be excluded from the gross estate merely because the premiums were paid from community funds. They are to be included if the decedent retained any of the legal incidents of ownership.

II

THE DECEDENT RETAINED INCIDENTS OF OWNERSHIP SUFFICIENT TO WARRANT THE INCLUSION IN HIS GROSS ESTATE OF THE PROCEEDS OF THE POLICIES, NOTWITHSTANDING THE FACT THAT THE PREMIUMS WERE PAID WITH COMMUNITY FUNDS

Under the principles just discussed the total proceeds of the policies must be included in the decedent's gross estate if he retained incidents of ownership and control until the date of his death. See also *Chase Nat. Bank* v. *United States,* 278 U. S. 327; *Bingham* v. *United,* 296 U. S. 211; *Industrial Trust Co.* v. *United States,* 296 U. S. 220. The issue to be determined here is whether the fact that the premiums were paid from community funds so deprived the decedent husband of the incidents of ownership and control of the policies on his life that a part of the proceeds proportionate to one-half of the premiums paid with the community funds should be excluded from his gross estate.

It is clear that with respect to the policies issued prior to the decedent's marriage in 1905 and those issued subsequently, up to the date of the passage

of the Revenue Act of 1918, the decedent retained the right to change the beneficiaries; for otherwise it would not be conceded in the certificate that any part of the proceeds were taxable. It is well settled that the proceeds of policies payable to named beneficiaries taken out prior to the passage of the Revenue Act of 1918 may not be included in the gross estate unless that right is reserved. *Bingham* v. *United States, supra; Industrial Trust Co.* v. *United States, supra; McKelvy* v. *Commissioner,* 82 F. (2d) 395 (C. C. A. 3rd); *Levy's Estate* v. *Commissioner,* 65 F. (2d) 412 (C. C. A. 2nd); *Pennsylvania Co. for Insurance* v. *Commissioner,* 79 F. (2d) 295 (C. C. A. 3rd), certiorari denied, 296 U. S. 651; *Helvering* v. *Parker,* 84 F. (2d) 838 (C. C. A. 8th). See also *Commissioner* v. *Sharp,* 91 F. (2d) 804 (C. C. A. 3rd), affirmed, on other grounds, March 14, 1938, No. 558, present Term; *Helburn* v. *Ballard,* 85 F. (2d) 613 (C. C. A. 8th). The certificate merely inquires whether a part of the proceeds proportionate to the wife's interest in the community funds used to pay the premiums is to be excluded.

Similarly, with respect to the policies issued after the passage of the Revenue Act of 1918, it may properly be assumed that the decedent reserved the right to change the beneficiary or such other incidents of ownership as were deemed sufficient under the decision of this Court in *Chase Nat. Bank* v. *United States, supra,* to make the proceeds of an insurance policy taxable. Other-

wise, the certificate would not concede that any portion of the proceeds should be included in the gross estate.

Accordingly, with respect to both groups of policies the issue is to what extent the husband's incidents of ownership and control are restricted by his use of the community funds to pay the premiums.

In the *Chase Nat. Bank* case this Court defined the incidents of ownership and control which justified the imposition of an estate tax upon the proceeds of insurance policies which were payable to beneficiaries other than the estate. The Court there said (pp. 334–335):

> It is true, as emphasized by plaintiffs, that the interest of the beneficiaries in the insurance policies effected by decedent "vested" in them before his death and that the proceeds of the policies came to the beneficiaries not directly from the decedent but from the insurer. But until the moment of death the decedent retained a legal interest in the policies which gave him the power of disposition of them and their proceeds as completely as if he were himself the beneficiary of them. The precise question presented is whether the termination at death of that power and the consequent passing to the designated beneficiaries of all rights under the policies freed of the possibility of its exercise may be the legitimate subject of a transfer tax, as is true of the termination by death of

any of the other legal incidents of property through which its use or economic enjoyment may be controlled.

A power in the decedent to surrender and cancel the policies, to pledge them as security for loans, and the power to dispose of them and their proceeds for his own benefit during his life which subjects them to the control of a bankruptcy court for the benefit of his creditors, *Cohen* v. *Samuels,* 245 U. S. 50 (see *Burlingham* v. *Crouse,* 228 U. S. 459), and which may, under local law applicable to the parties here, subject them in part to the payment of his debts, N. Y. *Domestic Relations Law,* c. 14, Consol. Laws § 52; *Kittel* v. *Domeyer,* 175 N. Y. 205; *Guardian Trust Co.* v. *Straus,* 139 App. Div. 884, aff'd 201 N. Y. 546, is by no means the least substantial of the legal incidents of ownership, and its termination at his death so as to free the beneficiaries of the policy from the possibility of its exercise would seem to be no less a transfer within the reach of the taxing power than a transfer effected in other ways through death.

The applications for the policies in this case were made by the husband and the contract was between him and the insurance company. He alone chose the beneficiaries of the policies; and the contracts gave him alone the power to change them. The wife was not a party to the contracts and had no interest in them apart from whatever interest she acquired as a beneficiary under those made payable to her and from whatever interest she had by virtue

of the husband's use of the community funds to pay the premiums. Hence the query in this case is as to whether under the Washington community property law and decisions the fact that he did use community funds in paying the premiums and that his wife was the beneficiary under some of the policies operated to deprive him of the right which he otherwise would have had to change the beneficiary, to surrender and cancel the policies, to pledge them for loans, or to dispose of them and their proceeds for his own benefit during his lifetime. The fact that policies paid for with community funds may be termed "community assets" in the Washington decisions (see *Occidental Life Ins. Co.* v. *Powers,* 74 Pac. (2d) 27) furnishes no solution to this problem. It is necessary to ascertain what rights the husband retains in respect of such assets.

Under the Washington community property law the husband is given the complete and exclusive right to manage, control, and dispose of community personal property, with the qualification that he cannot devise by will more than one-half of such property. Section 6892, Remington's Revised Statutes of Washington, Appendix B, *infra,* p. 52. The test as to whether his contracts relating to community personal property bind the community is whether they were made, in the course of his management, for the benefit of the community, and not whether they were of actual benefit to the community. *Way* v. *Lyric Theater Co.,* 79 Wash. 275; *Catlin* v. *Mills,* 140 Wash. 1; *Henning* v. *Ander-*

son, 121 Wash. 53; *American Surety Co.* v. *Sandberg*, 244 Fed. 701 (C. C. A. 9th); *O'Malley & Co.* v. *Lewis*, 176 Wash. 194. He is not required to account to his wife, as an agent is required to account to his principal (*Poe* v. *Seaborn*, 282 U. S. 101; *Daniel* v. *Daniel*, 106 Wash. 659). The statute does not even provide that he shall not give away community property without his wife's consent, although in specific instances the courts have set aside such gifts. *Parker* v. *Parker*, 121 Wash. 24; *Marston* v. *Rue*, 92 Wash. 129; *Schramm* v. *Steele*, 97 Wash. 309; *In re McCoy's Estate*, 189 Wash. 103. See also *Poe* v. *Seaborn*, *supra*. In most of the more recent Washington cases the court has said that the husband cannot give away a *substantial* amount of community property. See *Parker* v. *Parker*, *supra*; *Nimey* v. *Nimey*, 182 Wash. 194. In any case, the burden of proof is upon the wife when she seeks to interfere. *Gould* v. *Culver*, 148 Wash. 689; *Marston* v. *Rue*, *supra*.

There are few Washington decisions dealing with the question whether the wife may claim part of the proceeds of insurance policies the premiums on which have been paid with community funds. We have found none holding that she may claim an interest in policies which were originally made payable to the decedent's children or other beneficiaries, with the right reserved to change them; and the taxpayer has cited none. In all the decided cases the wife was named as beneficiary and

the husband changed the beneficiary without her knowledge.

In *Cade* v. *Head Camp, W. O. W.*, 27 Wash. 218 (decided in 1902), it was held that a wife could not recover on a beneficial certificate of a fraternal organization originally made payable to her where the assessments had been paid from community funds and her husband had taken out a new certificate payable to his father and mother without her knowledge and consent. The court there held that the fact that the assessments had been paid from community funds did not deprive him of his right to change the beneficiary and that he would have had the same right to do so had they been paid with her separate funds.

But in *Occidental Life Ins. Co.* v. *Powers, supra*, the court refused to follow the *Cade* case and the wife was allowed to recover the total proceeds of an insurance policy on her husband's life where she had been the original beneficiary and the premiums had been paid with community funds, even though the policy gave the decedent the right to change the beneficiary, and he had substituted his mother and an employee as beneficiaries. The basis of the decision appears to be that the change was made without the knowledge and consent of the wife and that any gift of the community funds without the knowledge and consent of the wife was invalid. But the decision in that case was a five to four decision and Judge Beals pointed out in his dissent that it had never been the rule in Wash-

ington that the husband could not make any gift whatever of the community funds, but merely that he could not give away substantial sums so as to defraud his wife. See *Parker* v. *Parker, supra; Nimey* v. *Nimey, supra; Marston* v. *Rue, supra.* Judge Beals considered also that the payment should be deemed to be for the benefit of the community, for the reason that it was against public policy to hold that a married man could make no provision for his relatives and dependents unless the wife should consent to his use of the community funds for that purpose. Finally, it was pointed out that if there was any gift, it was a gift of the premiums paid from community funds, and not a gift of the proceeds of the policies, and that the majority opinion had erroneously allowed the wife to recover the total proceeds.

In *Shields* v. *Barton,* 60 F. (2d) 351, the Circuit Court of Appeals for the Seventh Circuit had before it a case in which a surviving husband claimed part of the proceeds of an insurance policy on his wife's life which was made payable to his wife's sister. The policy had been taken out before marriage and part of the premiums had been paid with separate funds and part with community funds. The court there held that the husband could recover a proportionate part of the proceeds, but in doing so it relied upon California decisions and not upon Washington decisions.

In view of the fact that the *Cade* and the *Occidental Life Ins. Co.* cases are the only Washington

cases dealing with the question whether the wife can recover any part of the proceeds of an insurance policy on her husband's life when the premiums are paid with community funds, and that both of those cases dealt with policies made payable to the wife, we submit that it cannot be assumed that under the Washington law the wife in this case would have been able to recover any part of the proceeds of the policies made payable to the decedent's children. We see no reason to doubt that the decedent retained until his death the same right to change the beneficiaries of those policies, to cancel or surrender them, and to borrow on them, that he would have had if the premiums were paid with his separate funds.

It is no answer to suggest that the presumption of local law is that he took out the policies as agent for the community. Section 302 (g) of the Revenue Act of 1926, *infra,* provides that the proceeds of insurance policies are to be included in the gross estate where the policies were "taken out by the decedent." The words "taken out by" do not require that a presumption of local law should control this issue. In *Poe* v. *Seaborn, supra,* it was held that where a Federal statute imposed a tax upon the net income "of every individual," the word "of" denoted ownership, and hence that the local law controlled. The words "taken out by" carry no such implication. *Burnet* v. *Harmel,* 287 U. S. 103. The statute in substance requires that the proceeds are to be included unless there is proof

that the policies were not taken out by the decedent. A presumption under the local law that they are taken out by the community is not the proof required. See *Robinson* v. *Commissioner,* 63 F. (2d) 652 (C. C. A. 6th), certiorari denied, 289 U. S. 758.

The provisions of the Federal taxing statutes may not be vitiated by means of a state statute prescribing a mode of proof inconsistent with that required by the Federal revenue laws. *Burk-Waggoner Assn.* v. *Hopkins,* 269 U. S. 110; *Weiss* v. *Wiener,* 279 U. S. 333, 337; *California Iron Yards Co.* v. *Commissioner,* 47 F. (2d) 514 (C. C. A. 9th); *Robinson* v. *Commissioner, supra;* see, also, *New Orleans & N. E. R. Co.* v. *Harris,* 247 U. S. 367. *Robinson* v. *Commissioner, supra,* involved Section 302 (e) of the Revenue Act of 1924, which required that there be included in the gross estate the entire amount of joint bank deposits "except such part thereof as may be shown to have originally belonged" to the survivor. It was argued that under the laws of Michigan there was a presumption of equal ownership of the deposits and that in the absence of any other proof this presumption must prevail. The court rejected the argument.

We concede that it is proper to consult the state law to determine what incidents of ownership were retained by the decedent, but we submit that the Court is not required to give effect to presumptions and fictions of Washington law which have no real substance. The Federal taxing statutes do not deal with the community as an entity (*Poe* v. *Seaborn,*

supra) but follow the local view that the community funds are owned by the husband and wife equally. Hence the most that can be said is that the decedent used some of his wife's money to pay the premiums on these policies. He applied for the insurance and chose the beneficiaries—and the Washington decisions do not show that he did not have all of the incidents of ownership of the policies that he would have had if he had used his own funds. The court below in the case of *Bank of America Nat. T. & Sav. Ass'n* v. *Commissioner, supra,* held that the total proceeds of policies on the husband's life which were payable to beneficiaries whose identity was not disclosed should be included in the gross estate, notwithstanding the fact that the premiums were paid with community funds—and in so holding, stated that the local law did not control. We believe that the right result was reached in that case and that it cannot be distinguished from the case at bar by reason of the fact that there it was stipulated that the policies were taken out by the decedent. That was a stipulation on an issue of law which was not binding on the parties. *Swift & Co.* v. *Hocking Valley Ry. Co.,* 243 U. S. 281.

We consider now the policies payable to the decedent's wife. The *Bank of America* case did not deal with such policies, and the court did not consider the effect of the decision in the *Occidental Life Ins. Co.* case. For reasons given in the dissenting opinion in the latter case, to which we have pre-

viously referred (pp. 33–34, *supra*), we do not believe that the decision in that case is a sound application of Washington law. But even if it must be accepted as stating the law of Washington, the wife in this case could only have recovered the proceeds of the policies made payable to her, if the decedent had changed the beneficiary without consideration (see pp. 41–42, *infra*) and without her knowledge and consent, and if she had asserted a claim to them. This means that the change of beneficiary in such a case would be effective so long as the wife did not assert a claim; in other words, that the decedent had power even without consideration to give at least a defeasible interest in the policy to someone else.

In the court below counsel for the taxpayer relied upon the decisions of California. We do not believe that those decisions are pertinent. Under Section 172 of Deering's Civil Code of California, as amended in 1917, it is specifically provided that the husband cannot make any gift of the community personal property or dispose of it without a valuable consideration. There is no statutory provision to that effect in Washington. Even under the California decisions, however, the named beneficiary acquires an interest in the policy, subject only to its being defeated if the wife asserts a timely claim—and this despite the fact that in California since 1927 the wife, as in Washington, has by statute a vested half interest in community property. (See Sec. 161 (a), Deering's Civil Code

of California, 1931.) *Blethen* v. *Pacific Mut. Life Ins. Co.*, 198 Cal. 91;[4] *Union Mut. Life Ins. Co.* v. *Broderick*, 196 Cal. 497; *Dixon Lumber Co.* v. *Peacock*, 217 Cal. 415; *Mazman* v. *Brown*, 12 Cal. App. (2d) 272; *Martinez* v. *Hudson*, 14 Cal. App. (2d) 42; *Travelers Ins. Co.* v. *Fancher*, 219 Cal. 351. All but the first two of these cases involved premiums paid after the amendment of the California Community Property Law in 1927. These decisions establish that in California the wife's interest in a policy, the premiums on which are paid out of community funds, is not a vested or absolute interest.[5]

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[4] In this case the court said (pp. 101–102):

"The rule that the gift of a husband of community property is valid until avoided by the wife, applicable to community property in general, is applicable to the proceeds of an insurance policy, the premiums on which have been paid out of community funds.

"It follows that a gift by a husband of an insurance policy to a beneficiary, other than his wife, is a good and valid gift until avoided by the wife by an assertion of her right to one-half of the proceeds, and the insurance company, until it has been made aware of the wife's claim, is justified in delivering to the beneficiary, as the person rightfully entitled thereto, the proceeds of the policy upon the death of the insured husband. The insurance company having contracted with the husband, and having promised to pay the proceeds of the policy to whomsoever he designated, in the absence of notice of any adverse claim, could do nothing but fulfill its contract. In short, until the wife has given notice of her claim to one-half of the proceeds, thereby asserting her statutory right of avoiding the gift *ab initio* (*Dargie* v. *Patterson*, *supra*), all of the parties to the contract of insurance were entitled to deal with the subject matter thereof as if the gift were absolute."

[5] So far as any statements of the court in *New York Life Ins. Co.* v. *Bank of Italy*, 60 Cal. App. 602, cited in the

The named beneficiary under the policy may collect the proceeds unless the wife asserts her interest before they are paid. It should be noted also that in all of the cases the insurance was made payable to another without the wife's knowledge until after her husband's death. If she had known that her husband had named a beneficiary other than herself, she undoubtedly would have been precluded from asserting a claim to the proceeds after his death. See *Blethen* v. *Pacific Mut. Life Ins. Co., supra.*

We do not believe that the California decisions are pertinent to this case. We refer to them because they were relied upon by the taxpayer in the court below, and have been cited by *amicus curiae,* as indicating that the wife has an absolute right to the proceeds of policies paid with community funds. We do not think that they go so far. Moreover, we again emphasize that in California there is a specific provision against the husband's giving away any community property, whereas there is no such provision in the Washington statute, and most of the decisions hold merely that he may not give away a substantial amount of such property. *Parker* v. *Parker; Nimey* v. *Nimey,* both *supra.* We question whether a married man who, each year, uses a few hundred or even a few

brief of the *amicus curiae,* p. 6, may indicate the contrary, they must be taken to have been qualified by the later decisions of the Supreme Court of California, cited above.

thousand dollars from large community funds to pay premiums on life insurance policies made payable to a beneficiary other than his wife can be said to have given away a substantial part of the funds.

It has been held under the Washington decisions that the wife, as beneficiary, acquires no vested interest in policies which are made payable to her subject to the right of the husband to change the beneficiary. *Schade* v. *Western Union Life Ins. Co.,* 125 Wash. 200; *Seattle Ass'n of Credit Men* v. *Bank of Cal.,* 177 Wash. 130; *Toole* v. *National Life Insurance Co.,* 169 Wash. 627; *Johnston* v. *Johnston,* 182 Wash. 573; *Massachusetts Mutual Life Ins. Co.* v. *Bank of California,* 187 Wash. 565. In most of those cases it does not appear whether the premiums were paid with community funds. But in the *Johnston* case part of them were so paid, and it was nevertheless held that the wife did not have a vested interest. Because she does not have a vested interest in such a policy the cases hold that the husband may, for a consideration, assign the policy or change the beneficiary, even though the policy was made payable to the wife. *Schade* v. *Western Union Life Ins. Co., supra; Johnston* v. *Johnston, supra; Seattle Ass'n of Credit Men* v. *Bank of Cal., supra.* In the *Johnston* case the policy had been made payable to the wife, with the right to change the beneficiary reserved, and the first premium had been paid with community funds.

The husband changed the beneficiary to his father, who had supported him during an illness. Upon his death the wife brought an action against his father and mother and against the insurance company to recover the proceeds. The court held that the change in beneficiary was not made as a gift but for a consideration and that the wife was not entitled to recover.

These decisions indicate that the husband in this case was free to assign the policies or change the beneficiaries for a consideration, without his wife's consent. It may be argued that he could have done so only for a consideration flowing to the community, but such an argument loses sight of the fact that the husband's purposes and the community's purposes are practically identical. In the *Johnson* case the consideration for the decedent's change of the beneficiary from the wife to his father was support and care for himself. Undoubtedly a husband's assignment of the policy to pay a tailor's bill or personal traveling expenses would similarly be termed an assignment for community purposes under the Washington law. But this is a mere fiction. It is clear that such an assignment or a change of beneficiary for such a consideration would serve to satisfy the personal needs and desires of the husband alone. Yet for such a purpose the husband can deprive the wife of her right to receive the proceeds of the policies.

We submit, therefore, that the husband retained sufficient incidents of ownership in the policies made payable to his wife to render them subject to Federal estate tax, notwithstanding the fact that the premiums were paid in whole or in part from community funds. His right to change the beneficiary, to assign the policy, or to borrow on it for purposes which would benefit him personally, are substantial incidents of ownership and bring the proceeds of the insurance policies within Section 302 (g), *infra*, under the rules laid down by this Court in *Chase Nat. Bank* v. *United States, supra*. In this connection, it is not without significance that the Washington inheritance tax law now provides that the proceeds of insurance policies payable on the death of any person shall be taxed, "irrespective of the fact that the premiums of the policy have been paid by some person, partnership or corporation other than the insured." Section 115, Laws of Washington, 1935, c. 180, p. 784 (Appendix B, *infra*, pp. 52–55). See also *In re McGrath's Estate*, 71 Pac. 395 (Wash.).

CONCLUSION

We submit that the first alternative to the first question certified should be answered "Yes", and the second alternative "No"; that the second question should be answered "Yes"; that the fourth

and fifth questions should be answered "No"; and that the third question requires no answer.

Respectfully submitted.

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APRIL 1938.

APPENDIX A

Revenue Act of 1926, c. 27, 44 Stat. 9:

SEC. 301. (a) In lieu of the tax imposed by Title III of the Revenue Act of 1924, a tax equal to the sum of the following percentages of the value of the net estate (determined as provided in section 303) is hereby imposed upon the transfer of the net estate of every decedent dying after the enactment of this act, whether a resident or nonresident of the United States;

* * * * *

(U. S. C., Title 26, Secs. 410, 460.)

SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

* * * * *

(g) To the extent of the amount receivable by the executor as insurance under policies taken out by the decedent upon his own life; and to the extent of the excess over $40,000 of the amount receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life.

(h) Except as otherwise specifically provided therein subdivisions (b), (c), (d), (e), (f), and (g) of this section shall apply to the transfers, trusts, estates, interests, rights, powers, and relinquishment of powers, as severally enumerated and described therein, whether made, created, arising, existing, exercised, or relinquished before or after the enactment of this Act.

* * * * *

(U. S. C., Title 26, Sec. 411.)

Treasury Regulations 70 (1929 Edition), promulgated under the Revenue Act of 1926:

> ART. 25. *Taxable insurance.*—The statute provides for the inclusion in the gross estate of insurance taken out by the decedent upon his own life, as follows: (a) All insurance receivable by, or for the benefit of, the estate; (b) all other insurance to the extent that it exceeds in the aggregate $40,000.
>
> The term "insurance" refers to life insurance of every description, including death benefits paid by fraternal beneficial societies, operating under the lodge system. Insurance is deemed to be taken out by the decedent in all cases where he pays all the premiums, either directly or indirectly, whether or not he makes the application. On the other hand, the insurance is not deemed to be taken out by the decedent, even though the application is made by him, where all the premiums are actually paid by the beneficiary. Where a portion of the premiums were paid by the beneficiary and the remaining portion by the decedent the insurance will be deemed to have been taken out by the latter in the proportion that the premiums paid by him bear to the total of premiums paid.
>
> ART. 27. *Insurance receivable by other beneficiaries.*—All insurance in excess of $40,000 receivable by beneficiaries other than the estate, regardless of when taken out, must be included in the gross estate where the decedent during his life retained legal incidents of ownership in the policies of insurance, as, for example, a power to change the beneficiary, to surrender or cancel the policies, to assign them, to revoke an assignment of them, to pledge them for loans, or

to dispose otherwise of them and their proceeds for his own benefit, etc.

However, irrespective of the retention of such legal incidents of ownership, all insurance in excess of $40,000 receivable by beneficiaries other than the estate must be included in the gross estate (1) of any decedent dying after the enactment of the Revenue Act of 1924, where such insurance was taken out, or the beneficiary receiving the proceeds was named, after the enactment of the Revenue Act of 1918, and (2) of any decedent dying after the passage of the Revenue Act of 1918, but before the effective date of Title III of the Revenue Act of 1924, where such insurance was taken taken out, or the beneficiary receiving the proceeds was named, after the enactment of the particular revenue act in force and effect at the time of such a decedent's death.

The estate is entitled to only one exemption of $40,000 upon insurance receivable by beneficiaries other than the estate. For example, if the decedent left life insurance payable to three such beneficiaries in amounts of $10,000, $40,000, and $50,000 (total, $100,000), the full amount should be listed on the return and therefrom subtracted the $40,000 exemption as provided in Schedule C of Form 706. The word "beneficiaries," as used in reference to the $40,000 exemption, means persons entitled to the actual enjoyment of the insurance money.

ART. 28. *Valuation of insurance.*—The amount to be returned where the policy is payable to or for the benefit of the estate is the amount receivable. Where the proceeds of a policy are payable to a beneficiary other than to or for the benefit of the estate, and all the premiums were paid by the

> decedent, the amount to be listed on Schedule C of the return is the full amount receivable, but where the proceeds are so payable and only a portion of the premiums were paid by the decedent, the amount to be listed on such schedule is that proportion of the insurance receivable which the premiums paid by the decedent bear to the total premiums paid.* * *

Treasury Regulations 80 (1934 Ed), promulgated under the Revenue Acts of 1926 and 1932, as amended:

> ART. 25. *Taxable insurance.*—The statute provides for the inclusion in the gross estate of insurance taken out by the decedent upon his own life, as follows: (a) All insurance receivable by, or for the benefit of, the estate; (b) all other insurance to the extent that it exceeds in the aggregate $40,000.
>
> The term "insurance" refers to life insurance of every description, including death benefits paid by fraternal beneficial societies, operating under the lodge system. Insurance is considered to be taken out by the decedent in all cases, whether or not he makes the application, if he pays the premiums either directly or indirectly, or they are paid by a person other than the beneficiary, or decedent possesses any of the legal incidents of ownership in the policy. Legal incidents of ownership in the policy include, for example: The right of the insured or his estate to its economic benefits, the power to change the beneficiary, to surrender or cancel the policy, to assign it, to revoke an assignment, to pledge it for a loan, or to obtain from the insurer a loan against the surrender value of the policy, etc. The decedent possesses a legal incident of owner-

ship if the rights of the beneficiaries to receive the proceeds are conditioned upon the the beneficiaries surviving the decedent.

ART. 27. *Insurance receivable by other beneficiaries.*—The statute requires the inclusion in the gross estate of the decedent of the proceeds of any policy, or the aggregate proceeds of all policies, not receivable by or for the benefit of decedent's estate, to the extent that such proceeds exceed $40,000, regardless of when the policy was or the policies were issued, if the decedent possessed at the time of his death any of the legal incidents of ownership.

The estate is entitled to only one exemption of $40,000 upon insurance receivable by beneficiaries other than the estate. For example, if the decedent left life insurance payable to three such beneficiaries in amounts of $10,000, $40,000, and $50,000 (total, $100,000), the full amount should be listed on the return and therefrom subtracted the $40,000 exemption as provided in Schedule C of Form 706. The word "beneficiaries," as used in reference to the $40,000 exemption, means persons entitled to the actual enjoyment of the insurance money.

ART. 28. *Valuation of insurance.*—The amount to be returned if the policy is payable to or for the benefit of the estate is the amount receivable. If the proceeds of a policy are payable to a beneficiary other than to or for the benefit of the estate, the amount to be listed on Schedule C of the return is the full amount receivable. (For taxable portion, see article 27.) * * *

APPENDIX B

Remington's Revised Statutes of Washington, Annotated (1932 Edition):

Volume 3:

SEC. 1342. *Descent of community property.*—Upon the death of either husband or wife, one-half of the community property shall go to the survivor, subject to the community debts, and the other half shall be subject to the testamentary disposition of the deceased husband or wife, subject also to the community debts. In case no testamentary disposition shall have been made by the deceased husband or wife or his or her half of the community property, it shall descend equally to the legitimate issue of his, her or their bodies. If there be no issue of said deceased living, or none of their representatives living, then the said community property shall all pass to the survivors to the exclusion of collateral heirs, subject to the community debts, the family allowance, and the charges and expenses of administration.

SEC. 1370. *Community interests.*—This act shall apply to community real property and also to separate estate; and upon the death of either husband or wife, title of all community real property shall vest immediately in the person or persons to whom the same shall go, pass, descend or be devised, as provided in section 1342, subject to all the charges mentioned in section 1366 of this act.

SEC. 1419. *Community property, how administered.*—A surviving spouse shall be en-

titled to administer upon the community property, notwithstanding any provisions of the will to the contrary, if the court find such spouse to be otherwise qualified; but if such surviving spouse do not make application for such appointment within forty days immediately following the death of the deceased spouse, he or she shall be considered as having waived his or her right to administer upon such community property. If any person, other than the surviving spouse, make application for letters testamentary on such property, prior to the expiration of such forty days, then the court, before making any such appointment, shall require notice of such application to be given the said surviving spouse, for such time and in such manner as the court may determine, unless such applicant show to the satisfaction of the court that there is no surviving spouse or that he or she has in writing waived the right to administer upon such community property.

Volume 8:

SEC. 6890. *Separate property of husband.*—Property and pecuniary rights owned by the husband before marriage, and that acquired by him afterward by gift, bequest, devise or descent, with the rents, issues, and profits thereof, shall not be subject to the debts or contracts of his wife, and he may manage, lease, sell, convey, encumber, or devise, by will, such property without the wife joining in such management, alienation, or encumbrance, as fully and to the same effect as though he were unmarried.

SEC. 6891. *Separate property of wife.*—The property and pecuniary rights of every married woman at the time of her marriage, or afterward acquired by gift, devise, or inheritance, with the rents, issues, and profits

thereof, shall not be subject to the debts or contracts of her husband, and she may manage, lease, sell, convey, encumber or devise by will such property to the same extent and in the same manner that her husband can, property belonging to him.

SEC. 6892. *Community property defined—Husband's control of personalty.*—Property, not acquired or owned as prescribed in the next two preceding sections, acquired after marriage by either husband or wife, or both, is community property. The husband shall have the management and control of community personal property, with a like power of disposition as he has of his separate personal property, except he shall not devise by will more than one-half thereof.

SEC. 6893. *Community realty, conveyance of, etc.*—The husband has the management and control of the community real property, but he shall not sell, convey, or encumber the community real estate, unless the wife join with him in executing the deed or other instrument of conveyance by which the real estate is sold, conveyed, or encumbered, and such deed or other instrument of conveyance must be acknowledged by him and his wife: *Provided, however*, that all such community real estate shall be subject to the liens of mechanics and others for labor and materials furnished in erecting structures and improvements thereon as provided by law in other cases, to liens of judgments recovered for community debts, and to sale on execution issued thereon.

Laws of Washington (1935), c. 180:

Revenue Act of 1935:

SEC. 115. Insurance payable upon the death of any person shall be deemed a part of the estate for the purpose of computing

the inheritance tax and shall be taxable to the person, partnership or corporation entitled thereto. Such insurance shall be taxable irrespective of the fact that the premiums of the policy have been paid by some person, partnership or corporation other than the insured, or paid out of the income accruing from principal provided by the assured for such payment, whether such principal was donated in trust or otherwise: *Provided, however,* That there is exempt from the total amount of insurance, regardless of the number of policies, the sum of forty thousand dollars and no more: *Provided, however,* That in the case of insurance upon the life of a decedent officer or employee of a corporation, payable to the corporation, or upon the life of a decedent, employee of or partner in a business enterprise, payable to one or more of the partners, where all the premiums upon such policy have been paid exclusively by such beneficiary, upon the death of the decedent the amount only of the proceeds of the policy in excess of the cash surrender value immediately preceding the death of the decedent shall be deemed a part of the estate for the purpose of computing the inheritance tax, and taxed as provided in class A, section 106 of this title.

Where more than one beneficiary is entitled to the benefit of the provisions of this section exempting forty thousand dollars of the proceeds of insurance policies, payable upon death, the benefit of such exemption shall be apportioned among such beneficiaries ratably and proportionately: *Provided,* That where there is fraternal benefit society insurance payable upon the death of the decedent and other insurance payable upon the death of the decedent, the forty thousand

dollars exemption shall first be taken from the fraternal benefit society insurance, and, if the same does not equal forty thousand dollars, then the balance of the forty thousand shall be prorated among other policies.

The inheritance tax upon the proceeds of any insurance policy shall be a lien upon the proceeds of such policy in the hands or possession of the estate of the deceased insured or in the hands or possession of any other beneficiary under such policy to whom such proceeds may have been paid: *Provided,* That when proceeds of insurance payable upon death, or receivable by a beneficiary other than the executor or representative, the executor or representative shall recover from such beneficiary the tax due upon such proceeds of such policy or policies. The supervisor shall have power to release such lien with respect to all or any part of such proceeds if he be satisfied that the collection of the tax will not thereby be jeopardized.

Nothing in this act shall prevent the payment by any insurance company, association or society of the proceeds of any policy upon the death of a decedent to the person entitled thereto, but every insurance company, association or society, whether authorized to transact business within this state or not, having a policy or policies of insurance or death benefit or certificate or certificates in an aggregate amount of one thousand dollars or more payable upon the death of a decedent, a resident of this state, shall give a written notice of the death of the decedent and the amount of the policies issued and the names of the beneficiaries to the supervisor in such form as the supervisor may prescribe, within three days after receiving notice of the death of such decedent. Any

insurance company, association or society failing, neglecting or refusing to give such notice to the supervisor as above provided shall be personally liable for the payment of the inheritance tax herein provided.

U. S. GOVERNMENT PRINTING OFFICE: 1938